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No. 195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

T. M. DUCHE & SONS, INC., Petitioner,

v.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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Petitioner prays that, in the public interest, a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *T. M. Duche & Sons, Inc.* v. *United States,* Customs Appeal No. 4676, entered March 18, 1952.

OPINIONS BELOW

The opinion of the trial court (two judges to one) (R. 15) is reported in Customs Decisions 1300, Volume 26, U. S. Customs Court Rep., p. 61. The opinion of the Court of Customs and Patent Appeals (R. 58) (three judges to two) is reported as Customs Appeals Decisions 485, weekly *"Treasury Decisions"* of May 1, 1952, Volume 87, No. 18, page 64. Introduced in evidence in the

present case is the record of *T. M. Duche & Sons, Inc.* v. *United States,* Volume 36, Court of Customs and Patent Appeals Rep. (Customs), p. 19, Customs Appeals Decisions 391 (three judges to two). That record, in turn, incorporates the record in *T. M. Duche & Sons, Inc., et al.* v. *United States,* Volume 13, U. S. Customs Court Rep., p. 26, Customs Decisions 863 (two judges to one) and *David L. Moss Co., Inc.* v. *United States,* Volume 26, Court of Customs and Patent Appeals Rep. (Customs), p. 381, Customs Appeals Decisions 45 (three judges to two).

JURISDICTION

The Court of Customs and Patent Appeals entered judgment on March 18, 1952. (R. 69). This petition is filed under Rules 42 and 38 of the Rules of this Court providing for review of such a judgment by writ of certiorari.

QUESTION PRESENTED

An administrative agency determines the presence of a jurisdictional fact required to make valid a recommendation for a Presidential Proclamation: to what extent may the courts review that determination?

STATUTES INVOLVED

The statutes involved are:

(1) Sections 514 and 515 of the Tariff Act of 1930, 19 U.S.C.A. §§ 1514, 1515, 46 Stat. 734. These sections grant to importers the right to judicial review of the decisions of Collectors of Customs.

(2) Section 336 of the Tariff Act of 1930, 19 U.S.C.A. § 1336, 46 Stat. 701. This section delegates to the President the legislative power, within limits set out in the statute, of adjusting tariff duties upward or downward. This section requires the Tariff Commission, as a prerequisite to the President's action, to report to him the differences in costs between domestic and foreign production.

(3) Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, 60 Stat. 243. This section grants to "Any person suffering legal wrong because of any agency action * * * judicial review thereof." The sub-section prescribing the scope of review directs the courts to "hold unlawful and set aside agency action, findings and conclusions found to be * * * not in accordance with law * * * or short of statutory right * * *."

The foregoing statutory provisions are set forth in the Appendix hereto.

STATEMENT

That the petitioner is here again[1] would seem to be evidence of the proposition that vital issues, like old soldiers, never die; unlike old soldiers, vital issues do not fade away. The decision of the issue involved is of both present and future importance to a number of administrative agencies.[2] The application of the provisions of the Administrative Procedure Act (5 U.S.C.A. § 1009, 60 Stat. 243), herein sought, has never been decided by this Court.

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[1] This petitioner's application for the writ of certiorari in a prior case, *T. M. Duche & Sons, Inc.* v. *United States,* No. 523, October Term, 1948, involving the same factual issue, was denied on March 14, 1949. 336 U. S. 931, 93 L. ed. 1091.

[2] Among the statutory provisions which authorize agencies of the Federal Government, upon the presence of prescribed condi-

The Facts

The petitioner imported dried egg albumen. The Tariff Act of 1930 (19 U.S.C.A. § 1001, Par. 713, 46 Stat. 590-672) placed a duty upon that product of 18 cents per pound. The Collector of Customs assessed a duty of 27 cents per pound. The Collector's asserted authority was the Presidential Proclamation fixing the higher rate. The Proclamation followed a report and recommendation to the President by the Tariff Commission, in the form specified in the Tariff Act of 1930 (19 U.S.C.A. § 1336, 46 Stat. 701; see T. D. 44997, 60 Treasury Decisions, p. 20, (R. 37, 56)).

The petitioner filed a protest in the manner required. The protest claimed that the said Presidential Proclamation was illegal and void in that no investigations of the cost of egg products in the United States as required of the Tariff Commission by statute was made. The protest also claimed that no industry, engaged in the production of dried egg products, was in existence in the United States during, or prior to, the time of such investigation by the Tariff Commission.

The petitioner later spelled out the protest (R. 7) saying that the report of the Tariff Commission shows, on its

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tions, to report and recommend the issuance of proclamations by the President of the United States are included:

Section 22 of the Agricultural Adjustment Act, as amended, 7 U.S.C.A. § 624, 50 Stat. 246.

Section 3228(f) of the Internal Revenue Code, 26 U.S.C.A. § 3228(f), 60 Stat. 38.

Section 11 of the Immigration Act of 1924, as amended, 8 U.S.C.A. § 211, 43 Stat. 159.

Section 350 of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1351, 48 Stat. 943.

Sections 6 and 7 of The Trade Agreements Extension Act of 1951, 19 U.S.C.A. §§ 1363, 1364, 65 Stat. 73, 74.

face, that there was no compliance with the jurisdictional requirements of Section 336 of the Tariff Act and is an invalid basis for Presidential action in that—

(a) No domestic article as defined in Section 336 was commercially produced in the United States;

(b) No domestic costs of production, as definied in Section 336, were obtained;

(c) The alleged domestic costs of production (set out in the Tariff Commission's report) were merely caluclated costs and not actual commercial costs;

(d) The calculated costs were for a different, though related, article, despite the specific refusal of the Congress to amend the law to permit consideration of the costs of such a related article.

Petitioner claims that the imported dried egg albumen is properly dutiable at the rate of 18 cents per pound as fixed by Congress in the enactment of Paragraph 713, Tariff Act of 1930 (19 U.S.C.A. § 1001, Par. 713, 46 Stat. 590-672).

The judges in the courts dealing with customs matters have striven valiantly with the issue here.

In *David L. Moss Co., Inc.* v. *United States,* Volume 71, Treasury Decisions, p. 825, T.D. 48985, three judges of the Customs Court ruled that they had no power to review the findings of the Tariff Commission concerning this dried egg albumen. On appeal in *David L. Moss Co., Inc.* v. *United States,* Volume 26, U. S. Court of Customs and Patent Appeals Rep. (Customs), p. 381, Customs Appeals Decisions 45, four judges held that the Court of Customs and Patent Appeals had jurisdiction to deter-

mine whether the jurisdictional requirements had been complied with by the Tariff Commission: one judge dissented. Three judges thereupon affirmed the decision of the Customs Court: two judges dissented.

In *T. M. Duche & Sons, Inc.* v. *United States,* Vol. 13, U. S. Customs Court Rep., p. 26, Customs Decisions 863, three judges held that, on the authority of *United States* v. *George S. Bush & Co.,* 310 U. S. 371, 84 L.ed. 1259, there could not be review of a finding of fact by the President respecting this same dried egg albumen.

In *T. M. Duche & Sons, Inc.* v. *United States,* Volume 18, U. S. Customs Court Rep., p. 25, Customs Decisions 1040, two judges held that they had no authority to review the findings of the Tariff Commission respecting this dried egg albumen: one judge who had concurred in *T. M. Duche & Sons, Inc.* v. *United States,* Volume 13, U. S. Customs Court Rep., p. 26, Customs Decisions 863, now dissented. On appeal, in *T. M. Duche & Sons, Inc.* v. *United States,* Volume 36, U. S. Court of Customs and Patent Appeals Rep. (Customs), p. 19, Customs Appeals Decisions 391, four judges affirmed the court below: one judge dissented.

In the present proceeding, *T. M. Duche & Sons, Inc.* v. *United States,* Volume 26, U. S. Customs Court Rep., p. 61, Customs Decisions 1300, two judges held that the issue was ruled by the principle of *stare decisis* and that the Administrative Procedure Act was not applicable: one judge dissented. On appeal, in *T. M. Duche & Sons, Inc.* v. *United States,* weekly *"Treasury Decisions"* of May 1, 1952, Volume 87, No. 18, page 64, Customs Appeals Decisions 485, three judges held that the new issue of law presented by the Administrative Procedure Act had no effect so far as this egg albumen was concerned: two judges dissented.

In summary, the issue of the proper duty on dried egg albumen has been, on seven different occasions, before the only Courts (except this Court) which will hear this petitioner. In the four cases before the Customs Court, the vote has been ten to two against the petitioner. In the three cases before the Court of Customs and Patent Appeals, the vote has been ten to five against petitioner. Thus, after these seven presentations of this issue the members of these courts have been unable to convince each other. Even in the most recent hearing two members of the higher court have dissented from the decision of their three brethren.

The path of appeals from the Collector of Customs bars the petitioner from pleading conflict among courts of equal stature, e.g., the Circuit Courts of Appeal. The petitioner can, however, point to the long continuing disagreement among those judges most familiar with the subject matter. This persistent conflict evidences a basic lack of certainty respecting the law. The cure for this problem is the consideration by a court (this Court) with an unwearied mind.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Customs and Patent Appeals erred:[3]

1. In holding that the Court is limited to determining whether the Tariff Commission followed, in *form*, the statutory formula.

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[3] It will be observed that the petitioner seeks no review of the exercise of Presidential discretion. Our concern is entirely with the scope of judicial review of compliance with the requirements for presenting the subject for the exercise of that discretion.

2. In holding that that Court may not determine whether the Tariff Commission did, in *fact*, follow and stay within the prescribed jurisdictional requirements.

3. In holding that the Administrative Procedure Act does not authorize a judicial review of the proceedings before the Tariff Commission to determine whether there was substantial evidence to establish the Commission's compliance with the jurisdictional requirements of the Tariff Act.

4. In affirming the judgment of the Customs Court.

REASONS FOR GRANTING THE WRIT

1. The basic disputing here is no "tempest in a tea pot." The Tariff Commission alone, pursuant to Section 336 of the Tariff Act of 1930, has already submitted forty-four (44) reports to the President.[4] On the basis of these he has issued proclamations affecting the tariff on no less than one hundred and thirty-five (135) commodities.[4]

Clarification of the scope of review, of such reports of the Tariff Commission, is of importance to conscientious members of the Tariff Commission, to harassed judges, to perplexed importers, to manufacturers planning future production, to the foreign trade of the United States, and to our competitive economy.

2. The uncertainty respecting the courts' authority concerns no narrow group of men. On the contrary, the present confused state of the judicial record on this issue is a threat to the proper administration of numerous other statutory provisions.

Our great national stake in the "Reciprocal Trade

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[4] Compilation issued by office of the Secretary, United States Tariff Commission.

Agreements Program" is involved. Section 350 of the Tariff Act of 1930, as amended (19 U.S.C.A. § 1351, 48 Stat. 943), dealing with that Program provides for changes in rates by Presidential Proclamation after investigation, report and recommendations by the Tariff Commission. Of the total imports in 1950, over one billion dollars of merchandise was involved in the so-called "Escape Clause" proceedings, over which there was no judicial review under the doctrine of the majority of the Court of Customs and Patent Appeals in the present case. Of the thirty two (32) investigations covering these "Escape Clause" proceedings, some nineteen (19) investigations are even now in progress.[5] It is probably fair to say that substantially all of this very large sum concerns applications by American producers for increases in Trade Agreement rates. The passage of the Trade Agreements Extension Act of 1951 not only sets out the "Escape Clause" procedure in the statute itself (19 U.S.C.A. § 1364) but further provides that all future Trade Agreements shall contain such procedure (19 U.S.C.A. § 1363). With the increase of imports through the expansion of international trade, the volume of applications for relief through the "Escape Clause" procedure has become greater and the necessity for judicial review has not diminished but has become more pressing. The problem, therefore, is not academic or moot, but is the present and growing concern of private citizen and government alike. Compared to the interests of producers and importers in the judicial review of the actions of the Tariff Commission respecting these applications, the over all interest of the United States, grounded primarily on

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[5] See Tariff Commission Notices ordering hearings on applications by American manufacturers under the "Escape Clause" procedure for increases in duty.

the effective functioning of the Reciprocal Trade Agreements Program and secondarily because of the revenues involved, is even greater. In fact, on monetary grounds alone, the United States stands to lose vastly more than Petitioner, should this petition be denied.

Section 3228(f) of *Internal Revenue Code* (26 U.S.C.A. § 3228(f), 60 Stat. 38) authorizes Presidential Proclamation that certain drugs are opiates after findings by the Secretary of the Treasury to that effect. That authority concerns the fiscal economy, the control of the use of drugs, and the entire American medical world.

Section 11 of the Immigration Act of 1924, as amended (8 U.S.C.A. § 211, 43 Stat. 159) warrants Presidential Proclamations setting immigration quotas on the basis of findings and reports by the Secretary of State, the Secretary of Commerce, and the Attorney General. That power affects the lives, rights and duties of untold multitudes of persons, and gravely concerns the American families, relatives, and friends of such persons.

Section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C.A. § 624, 50 Stat. 246) provides for Presidential Proclamation limiting imports of agricultural products after investigation, report and recommendation by the Tariff Commission. The American farmer and virtually all American consumers of food are concerned with the adequacy of adherence to the prescribed factual basis for the exercise of so great a power.

The rights and fortunes of more persons than may readily be caluculated stand to be affected by the disposition this Court makes of an issue which goes to the very roots of judicial authority.

3. The form of existing Congressional delegations of legislative authority sets a pattern for the future delegations of such authority. It seems highly important that

we all know whether the Congress, seeking efficiency and expedition, intended to sacrifice, in that search, full judicial review of the findings of appointed administrators substituting for elected legislators.

In the present statutory pattern, the Chief Executive must rely, for findings of fact, upon subordinate officials. If the Congress has been inept in providing for full judicial review of the factual findings of such subordinates, it is in the public interest that the Congress be so informed. When this Court speaks, the Congress is authoritatively informed: until this Court speaks, the Congress is but faintly advised.

4. The opinion of the majority of the Court below appears to be in conflict with the opinions of this Court.

The majority of the Court of Customs and Patent Appeals holds that the Administrative Procedure Act (5 U.S.C.A. § 1009, 60 Stat. 243) does not require a review of the findings of the Tariff Commission, beyond determining whether it followed the form of the statutory formula.[6] This Court has said that the terms of the Administrative Procedure Act do call for judicial review of the facts, as well as the form, of those governmental entities which come within the purview of the Act and that the scope of such review shall determine whether the findings of fact are supported by substantial evidence on the record considered as a whole. See *Universal Camera*

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[6] The decision below also disregards *Barr* v. *U. S.*, 324 U. S. 83, 89 L.ed. 765, decided prior to the enactment of the Administrative Procedure Act, in which this Court expressly held that Sections 514 and 515 of the Tariff Act of 1930 provide for judicial review of all decisions of the collector "including the legality of the orders and findings entering into the protested decisions." The findings of the Tariff Commission which it reported to the President appear to be directly encompassed by this statutory provision, which the decision below fails to mention.

Corp. v. *National Labor Relations Board,* 340 U. S. 374, 95 L.ed. 456; *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498, 95 L.ed. 479.

The opinion of the majority of the Court below appears to be contrary to the holdings of this Court that findings of fact made under delegated legislative powers may be judicially reviewed and held invalid in the absence of a prescribed jurisdictional fact. See *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 144, 85 L.ed. 624, 635; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L.ed. 447; *Crowell* v. *Benson,* 285 U. S. 22, 76 L.ed. 599; *Waite* v. *Macy,* 246 U. S. 606, 62 L.ed. 892; *Muser* v. *Magone,* 155 U. S. 240, 39 L.ed. 135.

It is submitted that the holding of the majority of the Court of Customs and Patent Appeals is not reconcilable with the decisions of this Court.

5. The cases relied upon in the opinion of the majority of the Court below do not appear to rule the issue here involved.

J. W. Hampton, Jr. & Company v. *United States,* 276 U. S. 394, 411, 72 L.ed. 624, 631, relates to the constitutionality of the delegation by the Congress of legislative authority. The validity of the delegation is not an issue here. What we are concerned with is the scope of judicial review of the findings of the jurisdictional facts prescribed by the Congress.

Norwegian Nitrogen Products Co. v. *U. S.,* 288 U. S. 294, 77 L.ed. 796, treats with the propriety of proceedings —a fair hearing—before the Tariff Commission, prior to the adoption of the Administrative Procedure Act. That decision, if it can be said to deal in any measure with the scope of judicial review of the factual aspect of the Commission's findings, imposes no restriction upon a Court's review of the facts.

United States v. *George S. Bush & Co., Inc.*, 310 U. S. 371, 84 L.ed. 1259, is not applicable for two reasons. First, the question therein was a re-appraisement under Section 501 of the Tariff Act of 1930. That section, unlike Sections 514 and 515, here involved, contains no specific provision for judicial review of matters other than questions of law. Second, that the case was decided before the passage of the Administrative Procedure Act.

It is submitted that the majority of the Court of Customs and Patent Appeals have relied, in their reasoning, upon decisions of this Court which have no more than a momentary appearance of meeting the issue here.

CONCLUSION

Deciding the question of applying to this Court for the writ of certiorari puts a severe strain upon counsel's sense of obligation to minimize such applications. In the present type of case the citizen is trapped, in his search for those conflicts between courts below which are frequently persuasive of issuance of the writ. The highly specialized subject matter dealt with in the customs courts militates against conflicts with other courts.[7]

It is only where an issue appears to go directly to our methods of government and concerns many varieties of people and interests that the application seems war-

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[7] The most recent grant by this court of a writ of certiorari directed to the Court of Customs and Patent Appeals and pertaining to a customs matter was in 1944. Since that grant, this Court has denied 6 applications for the writ. In fact, since the writ of certiorari was granted in the *Hampton* case (272 U. S. 394) in June 1927, there have been only 2 grants of the writ in the past 25 years. These were in the *Bush* case (310 U. S. 371) in 1940 and the *Barr* case (324 U. S. 83) in 1944.

ranted. After effort to discount fully counsels' ardor for their cause, the issue here is judged to come within that category.

Regardless of the eventual outcome of the issue on its merits, it would seem that the extent to which the Courts may consider and pass upon the validity of the jurisdictional findings preliminary to a Presidential Proclamation should be clarified. If the Congress has failed to accord to the courts the jurisdiction which many persons, including eminent judges, believe the courts to possess, an authoritative statement of that failure should be pronounced if it serves only as a basis for the correction by the Congress.

Respectfully submitted,

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Dated: July 14, 1952

APPENDIX

A. *Tariff Act of 1930*

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS.

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against

the decision of the collector upon any question not involved in such reliquidation.

SEC. 515. SAME; REVIEW OF DECISIONS

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law.

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses

of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or simliar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402(g), of the domestic article, as it finds

shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date of Rates and Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the

weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and Regulations of President.—The President is authorized to make all needful rules and regula-

tions for carrying out his functions under the provisions of this section.

(j) Rules and Regulations of Secretary of Treasury.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with repsect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations Prior to Enactment of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the privisions of this section.

B. Administrative Procedure Act

SEC. 10. JUDICIAL REVIEW OF AGENCY ACTION

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of Review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable

(c) Every agency action made reviewable by satute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief Pending Review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to

prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 of this Act or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 195

T. M. DUCHE & SONS, INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the trial court (R. 15-31) are reported in 26 U. S. Cust. Ct. 61. The majority and dissenting opinions of the Court of Customs and Patent Appeals (R. 58-69) are reported as C.A.D. 485 in 87 Treas. Dec. 64 (Weekly Pamphlet No. 18, May 1, 1952).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals (R. 69) was entered on March 18, 1952. By order dated June 11, 1952, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari to and including July 15, 1952 (R. 72). The petition for a writ of certiorari was filed on July 14, 1952. The jurisdiction of this Court is apparently invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Pursuant to Section 336 of the Tariff Act of 1930 the United States Tariff Commission conducted an investigation to ascertain the difference in the cost of production of dried whole eggs, dried egg yolk, and dried egg albumen (white) in the United States and in China, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the rate of duty on dried egg products. The present suit was brought by an importer of dried egg albumen, alleging the proclamation of the President to be void. The question presented is whether the Customs Court has power to review the facts and conclusions upon which the Tariff Commission based its recommendation to the President that the rate of duties on dried eggs products be increased, and if dissatisfied to declare the proclamation void.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, *infra,* pp. 16-28.

STATEMENT

On June 24, 1931, the President of the United States proclaimed that a change in the rate of duty on dried whole eggs, dried egg yolk, and dried egg albumen was necessary to equalize the difference in the costs of production of those products in the United States and in the principal competing country, China, and that the duty which up to that time had been at the rate of 18 cents per pound as provided in Section 1, Par. 713, of the Tariff Act of 1930 (46 Stat. 590, 632; 19 U.S.C. 1001, Par. 713), should be changed to 27 cents per pound (R. 56-57). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions contained in Section 336 of the Tariff Act of 1930, *infra,* pp. 16-22 (R. 37-56). The Commission instituted the investigation on January 23, 1931, in compliance with United States Senate Resolution 389, adopted January 21, 1931 (R. 12-13). Public notice of a hearing was given on March 11, 1931, and a hearing was held on April 16, 1931, at which time interested parties were given an opportunity to be present, to produce evidence, and to be heard (R. 38). As a result of its investigation the Commission found that the duty of 18 cents per pound fixed by the statute did not equalize the difference in the costs of production of the domestic articles

and the Chinese articles, and that the duty necessary to equalize such difference, within the limits permitted under the statute, was 27 cents per pound (R. 40). It accordingly submitted to the President a report containing its findings (R. 35-56),[1] and its findings were approved by the President in his proclamation of June 24, 1931 (R. 56-57).

In making its investigation, the Commission used the years 1928 to 1930, inclusive, as a representative period of time upon which to base its findings with respect to the difference in the costs of production of domestic dried egg products and those imported from China (R. 38). The Commission found that the production of dried egg products in the United States during the representative period had been very small because the prices of the imported products had, despite the then existing rate of duty, been so low as to leave little incentive to engage in domestic production, although there were large industrial milk-drying facilities in this country which could be readily adapted to the drying of eggs (R. 43, 46-47). It further found that the determining factor in the cost of producing dried eggs in the United States was the amount paid for the shell eggs, which was more than nine-tenths of the total cost; that a domestic egg-freezing industry had been conducted on a large scale

[1] The Commission attached to its report a comprehensive summary of the information obtained in the investigation (R. 40-56).

during the representative period; that a large domestic egg-drying industry would have to buy its eggs in the same regions as those which supplied the domestic egg-freezing industry; and that the breaking-stock eggs used by the latter industry would, if used for egg-drying, furnish a product similar in quality to the dried egg products imported from China (R. 49). Accordingly, in order to give a broad basis for domestic raw materials cost, the Commission used, in lieu of the prices paid by the limited number of domestic egg driers, the weighted average of farm and central market prices for breaking-stock eggs delivered at the egg-freezing plants (R. 49-51). In computing the domestic operation costs in connection with the drying of eggs, the Commission used the actual operating costs of the domestic establishments engaged in the drying of eggs (R. 39). The Commission recognized that the actual operating costs of the few domestic egg-drying establishments might not give an entirely accurate indication of what operating costs would be if egg-drying were conducted on a much larger scale. It concluded, however, that the costs of domestic breaking-stock eggs amounted to such an unusually high percentage (90 to 95 per cent) of the total costs in the drying of eggs as to make any margin of error in the operating costs a matter of minor importance. (R. 53-54.)

After the President issued his proclamation, petitioner imported some dried egg albumen at the port of New York, which was assessed with duty

at the rate of 27 cents per pound pursuant to the proclamation. Petitioner thereupon filed a protest with the collector of customs at that port under Section 514 of the Tariff Act of 1930, contending that the proclamation was void on the ground that there had been no industry in the United States engaged in the production of dried egg products during or prior to the time the Tariff Commission made its investigation, and claiming that duty on the importation should have been assessed at the statutory rate of 18 cents per pound (R. 7-10). The assessment of duty on the importation at the rate of 27 cents per pound having been affirmed by the collector, the papers were duly transmitted to the Customs Court for decision as required by Section 515 of the Tariff Act, *infra*, pp. 27-28 (R. 9-10).

The Customs Court, one judge dissenting, overruled the protest and held, following the decision of this Court in the case of *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371, and the decision of the Court of Customs and Patent Appeals in *T. M. Duche & Sons* v. *United States*, 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931,[2] that it had no jurisdiction to weigh the evidence which was before the Tariff Commis-

[2] At the trial of the case it was stipulated by the parties that the record in the prior case of *T. M. Duche & Sons, Inc., v. United States*, 36 C.C.P.A. (Customs) 19, might be incorporated into the record of the instant case (R. 11), which was done (R. 16). The record in the incorporated case consisted of the record in the case of *T. M. Duche & Sons, Inc.*, v. *United States*, 13 Cust. Ct. 26, which in turn included the record in the case of *David L. Moss Co., Inc.* v. *United States*, 26 C.C.P.A. (Customs) 381.

sion or to explore the reasons which actuated the President in making his Proclamation (R. 16-18). The Customs Court further held that the Administrative Procedure Act, providing for judicial review of the action of administrative agencies, was inapplicable to the acts of the President and the Tariff Commission, when proceeding under Section 336, Tariff Act of 1930 (R. 15-31).

On appeal, the Court of Customs and Patent Appeals, two judges dissenting, affirmed the decision of the Customs Court (R. 58-69).

ARGUMENT

The issues in this case are identical with those in the prior case of *T. M. Duche & Sons* v. *United States,* 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931, decided adversely to petitioner's contentions,[3] *viz.,* whether the Customs Court has jurisdiction to review the Tariff Commission's report and recommendations to the President that he act under Section 336 of the Tariff Act of 1930, *infra,* pp. 16-22), to change the rate of duty on imported dried egg products, and if dissatisfied to declare the proclamation later issued by the President to be void.

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[3] The reasons underlying our view that the decision of the court below in that case was correct are set forth at some length in the Government's Brief in Opposition filed therein (No. 523, October Term, 1948), to which this Court is respectfully referred.

Section 336 of the Tariff Act of 1930, *infra*, pp. 16-22, authorizes the Tariff Commission to make investigations for the purpose of ascertaining the difference in the costs of production of a domestic article and a like or similar foreign article when produced in the principal competing country. That section prescribes that in the course of the investigation the Commission shall hold a hearing and give reasonable public notice thereof, and shall afford reasonable opportunity for persons interested to be present, to produce evidence, and to be heard at such hearing. The Commission is required to report the information thus obtained to the President and to specify in its report such changes in the rates of duties or such changes in classification or in valuation basis as it finds to be necessary to equalize the costs of production of the domestic and the foreign article. The section then empowers the President to make the suggested changes in the rates (within 50% limits), in classification, or in valuation basis, if in his judgment such changes are shown by the investigation to be necessary to equalize the costs of production.

Petitioner makes no contention in the case at bar that the Tariff Commission failed to observe any of the procedural requirements of Section 336 with respect to the holding of a hearing, the giving of public notice thereof, or the affording of oppor-

tunity to interested parties to be present and to be heard at the hearing.[4]

1. The issues presented herein were decided adversely to petitioner's contention by this Court in the case of *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371.[5] In the *Bush* case, which was relied on by the court below, and which involved judicial review of action taken by the President under Section 336 of the Tariff Act of 1930, *infra*, pp. 16-22, this Court cited *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, to the effect that the exercise by the President of the power which Congress has delegated to him for over a century under tariff statutes such as Section 336 is but one stage of the legislative process, and stated as follows (310 U. S. at pp. 379-380):

> And the judgment of the President that on the facts, adduced in pursuance of the proce-

[4] The Tariff Commission's report and the proclamation both show that all of these statutory requirements were observed (R. 38, 56).

[5] The prior conclusion of a majority of the Court of Customs and Patent Appeals in the case of *David L. Moss Co., Inc.* v. *United States*, 26 C.C.P.A. (Customs) 381, that the Customs Court had jurisdiction to determine whether there was any substantial evidence before the President to support the findings made by him in the proclamation here involved, was reached before this Court rendered its decision in the *Bush* case, and was disavowed by the majority of the Court of Customs and Patent Appeals in the prior case of *T. M. Duche & Sons, Inc.* v. *United States*, 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931, on the ground that it was unsound and because it was deemed to be at variance with the *Bush* decision.

dure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.[6]

Petitioner's assertion (Pet. 7, n.) that it seeks no review of the exercise of the President's discretion but only review of the Tariff Commission's action in making the recommendation to the President is self-defeating. Obviously, the Customs Court could grant no relief in this case without setting aside the Presidential proclamation, since the rate of duty established by the proclamation remains in force and effect so long as the proclama-

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[6] Petitioner again urges, as it did in the prior *Duche* case, that the decision of the court below is in conflict with the decisions of this Court (Pet. 11-12) in the cases of *Muser* v. *Magone*, 155 U. S. 240; *Waite* v. *Macy*, 246 U. S. 606; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; and *Crowell* v. *Benson*, 285 U. S. 22. These cases are all inapposite, and do not require extended discussion. They were all discussed in the Government's Brief in Opposition in the prior *Duche* case (No. 523, October Term, 1948). The *Magone* and *Macy* cases were both brought to this Court's attention in the *Bush* case (310 U. S. at p. 375), and apparently were not considered to be in conflict with the conclusions there reached. The other three cases cited by petitioner involved the constitutional power of the Congress to delegate legislative power. That issue has been resolved in the affirmative by this Court with respect to Section 336. *Hampton & Co.* v. *United States*, 276 U. S. 394. Furthermore, the other three cases were concerned with legal rights. But this Court has held that "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Products Co.* v. *United States, supra*, at p. 318; *United States* v. *Bush, supra*, at p. 379.

tion stands. The proclamation, not the Tariff Commission's report and recommendation, changes the rate of duty. "It [the Tariff Commission] does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President." *United States* v. *Bush, supra,* at p. 379. Petitioner's suit, which was brought under Section 514 of the Tariff Act, *infra,* pp. 26-27, seeks a refund of the duties which it paid in excess of the rate in force prior to the issuance of the President's proclamation, and it is beyond controversy that the Customs Court could not sustain petitioner's protest and direct a refund of the excess duties without holding the President's proclamation to be invalid. Since the procedural requirements of Section 336 were complied with in this case (see *supra,* pp. 8-9), it may not hold the proclamation to be invalid without interfering with the exercise of the President's discretion. Hence, the review which petitioner purports to seek in this case is tantamount to a review of the findings of the President which are embodied in his proclamation. Under the doctrine announced by this Court in the *Norwegian Nitrogen* and *Bush* cases, the President's action under section 336 of the Tariff Act, *infra,* pp. 16-22, is but a part of the legislative process and is not subject to judicial review. It is patent, therefore, that the relief which petitioner seeks in this case may not be granted as the result

of a judicial review of the Tariff Commission's action alone. Consequently, judicial review is barred by the decision in the *Bush* case.[7]

2. Petitioner makes the additional contention (Pet. 11) that the court below erred in holding that Section 10(a) of the Administrative Procedure Act (60 Stat. 237, 243; 5 U.S.C. 1009, *infra*, p. 28) does not require judicial review of the report and recommendations of the Tariff Commission other than to determine whether it has followed the forms of procedure required by Section 336 of the Tariff Act, *infra*, pp. 16-22. The contention is without substance. The judicial review provided for by Section 10(a) of the Administrative Procedure Act clearly contemplates the correction

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[7] Petitioner's contention (Pet. 13) that the *Bush* case is distinguishable is without merit. That contention, which was also made in the prior *Duche* case, is based on the ground that the *Bush* case was brought under Section 501 of the Tariff Act, *infra*, pp. 22-25, the language of which differs from Section 514 of that Act, *infra*, pp. 26-27, under which the instant suit was instituted. As we pointed out in the Government's Brief in Opposition (p. 16) in the prior *Duche* case, petitioner's contention is refuted by this Court's decision in *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, for that case was brought under a statute identical with Section 514 with respect to the review of orders and findings entering into decisions of collectors of customs. And it was in that case that this Court laid down the rule (approved in the *Bush* case) that the exercise by the President of his delegated powers under statutes such as Section 336 is not subject to judicial review if the forms of procedure are regularly observed (288 U. S. 318).

of transgressed legal rights, but the action of the Tariff Commission in this case did not affect any legal rights of petitioner. In *Norwegian Nitrogen Products Co.* v. *United States, supra,* this Court, speaking through Mr. Justice Cardozo, succinctly pointed out the difference between the action of an administrative body which affects legal rights and the action of the Tariff Commission when proceeding under Section 336. Mr. Justice Cardozo said, at p. 318:

> Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very

> different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. *Smyth* v. *Ames*, 169 U.S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts.

In the circumstances, there is no merit in the contention that Section 10(a) of the Administrative Procedure Act requires judicial review of the action of the Tariff Commission in making a report and its recommendations to the President under Section 336 of the Tariff Act. And as we have pointed out, *supra*, pp. 10-11, it is clear that, in any event, the Customs Court could grant no relief without disturbing the findings of the President embodied in his proclamation. It can scarcely be presumed that Congress intended Section 10(a) of the Administrative Procedure Act to require judicial review of those findings of the President, particularly in the light of this Court's holding in the *Bush* case (p. 380) that for the judiciary to probe those findings would amount to a clear invasion of legislative and executive domains.

CONCLUSION

The decision of the court below is correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted therefore that the pettiion for a writ of certiorari should bc denied.

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AUGUST, 1952.

APPENDIX

The pertinent provisions of the Tariff Act of 1930, as amended (46 Stat. 590; 52 Stat. 1077; 19 U. S. C. 1336, 1501, 1514, 1515) read as follows:

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of

production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the cost of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402(g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation By The President.—The President shall by proclamation approve the

rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date Of Rates And Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment Of Differences In Costs Of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds practicable:

(1) In The Case Of A Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In The Case Of A Foreign Article.—(A) The cost of production as hereinafter in

this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification Of Changes In Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers From The Free List To The Dutiable List Or From The Dutiable List To The Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivison or subdivi-

sions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules And Regulations Of President.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Rules And Regulations Of Secretary Of Treasury.—The Secretary of the Treasury is authorized to make such rules and regula-

tions as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations Prior To Enactment Of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of Section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section. [46 Stat. 701; 19 U.S.C. 1336.]

SEC. 501. NOTICE OF APPRAISEMENT; REAPPRAISEMENT

(a) The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value.

The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this chapter relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall in every case, notwithstanding that the original appraisement may for any reason be held invalid or void and that the merchandise or samples thereof be not available for examination, after affording the parties an opportunity to be heard on the merits, determine the value of the merchandise from the evidence in the entry record and that adduced at the hearing. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at

which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance cannot reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

(b) The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decison in writing, together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United

States Customs Court by the collector or other persons authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the finding is based and the reasons therefor. The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided by section 198 of the Judicial Code, as amended. [46 Stat. 730; 52 Stat. 1084; 19 U.S.C. 1501.]

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States, and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not

before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. [46 Stat. 734; 19 U.S.C. 1514.]

SEC. 515. SAME.

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all

duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law. [46 Stat. 734; 19 U.S.C. 1515.]

Section 10(a) of the Administrative Procedure Act (60 Stat. 237, 243; 5 U.S.C. 1009) reads as follows:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

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